

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 417 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

UDAYKUMAR MAGANNBHAI SETH

Versus

BHULABHAI KHUSALBHAI MAKWANA

Appearance:

MR YATIN SONI for Petitioner
MR ASHISH M DAGLI for Respondent No. 1
Mr S P Dave, APP for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 04/04/2001

ORAL JUDGEMENT

This is a Revision Application under section 397
of the Criminal Procedure Code, 1973 (for short, 'the
Code') for setting aside the order dated 7.8.2000
recorded by the learned Assistant Sessions Judge at

Bharuch below Application Exh.19 placed at page 2, under which the learned Judge allowed the said application of the prosecution and directed that summons be issued for recalling the witnesses mentioned in the application.

2. It appears from the record that the prosecution proceeded ahead with the trial of the court in Special Atrocity Case No.37/98. During the process of trial, prosecution examined certain witnesses. In all the prosecution has examined at least 7 witnesses. Thereafter, the learned APP, In-charge of the prosecution submitted application that through oversight, he could not apply for contradicting the witnesses, who turned hostile, with their earlier statement. Therefore, he prayed that the witnesses No.4,5 and 6 may be recalled for the aforesaid purpose.

3. The said application was objected on behalf of the petitioner, who is an accused person in the aforesaid trial. After hearing the parties, the learned Asstt. Sessions Judge allowed the said application and directed that the witnesses be recalled and summons be issued. Against the said order of the learned Asstt. Sessions Judge, the petitioner-original accused has preferred this Revision Application before this Court. It has been mainly contended here that the learned Asstt. Sessions Judge acting as Special Judge, has passed the said order without application of mind. That the impugned order passed by him is ex-facie illegal, unjust and contrary to the provisions contained under Section 311 of the code. That the learned trial Judge ought to have dismissed the said application submitted by the prosecution. That even otherwise, the application filed by the learned APP is vague and no new development or new circumstances had arisen to re-examine the said witnesses who have already been examined and cross-examined in detail by the learned Advocates for the parties. The learned Judge has not assigned any specific reason for the recalling of the witnesses. That the settled principles of law for recalling witnesses have not been properly appreciated by the learned Judge. That on the whole, the order of the learned Judge is illegal and perverse and deserves to be set aside.

4. It is, therefore, prayed that the present Revision Application be allowed and the aforesaid order of the learned Judge be set aside.

5. Notice was issued to the other side and in response to the notice, Mr Ashish Dagli, learned Advocate appears for respondent No.1. I have heard the learned

Advocate for the applicant and Mr S P Dave, learned APP for the State and Mr Ashish Dagli, learned Advocate for respondent no.1. I have also perused the order of the trial court.

6. Learned Advocate appearing for the applicant-original accused has come out with a case that recalling of witnesses ordered by the trial court is ex-facie illegal since the prosecution does not desire to introduce additional facts.

7. On going through the application at page 2, which was Exh.19 before the trial court, it appears that the prosecution has made it clear that the witnesses no. 4, 5 and 6 have been examined but through inadvertence, they have not been treated hostile and they have not been contradicted with their earlier statements and, therefore, they may be permitted to be recalled.

8. By and large, it does not appeal that the learned APP wanted to completely change the case by either treating the witness as hostile or by putting to them certain questions with respect to the contradictions between their evidence and their earlier statements before the police. Out of the said three witnesses, witness no.6 is Hirabhai Kachhia at Exh.21, witness No.5, Shaikh Ahmed, Exh.17 and witness no.4, Eliasbhai Abdul, Exh.12.

9. According to the prosecution before the trial court, these witnesses have not supported the prosecution and, therefore, they were required to be treated as hostile witnesses. The learned Judge has considered pros and cons of that application, passed an order in about six pages. Therefore, it cannot be said that the order has been passed by the learned Judge without application of mind. There is a provision in section 311 of the Code which empowers any court governed by this Code to recall witnesses already examined previously. The law envisaged in section 311 of the code says that any Court may, at any stage of any inquiry, trial or other proceedings under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

10. This clearly means that discretionary power and jurisdiction has been given to the trial court for

recalling of witnesses. In the present case, we find that the learned Judge has exercised his jurisdiction conferred on him by the provisions of section 311 of the Code. No illegality is found to have been committed in passing the said order.

11. Learned Advocate for the petitioner has contended that so far as witness no.5 is concerned, the learned APP Incharge of the prosecution had already applied for treating the witness as hostile and for permitting the prosecution to put questions which can be put in cross-examination. That permission was refused and therefore, the witness could not be recalled. Now as regards witness no.6 is concerned, the order is there at page no.19. There was no prayer about the witness but that does not mean that the witness should not be recalled for any purpose.

12. It is well settled that a witness may not be treated as hostile and yet the parties concerned may be permitted to contradict the witness with his earlier statement. For bringing such contradiction, it is never necessary that the witness should be treated hostile. Therefore, even without treating him hostile, the prosecution can be permitted to bring contradictions on record. Therefore, on this consideration, it cannot be said that the witnesses could not be recalled for any purpose.

13. It has also been argued that there is no provision of review of the earlier order and therefore, the order passed as aforesaid cannot be reviewed by the same court again. This will be a matter of argument as and when the order is sought to be reviewed. Recalling of witness does not mean reviewing the earlier order of the Court.

14. At any rate, it does not appear from the record that there is any illegality committed by the trial court while passing order for recalling witness. Learned Advocate for the petitioner has drawn my attention to a decision of this court in the case of Kantilal v. State of Gujarat in Criminal Misc.Application No.2355/99. There it has been observed that if in the application no specific case is advanced and vaguely it is mentioned that for convenient disposal and also to place some facts brought to light subsequently on record the witness was required to be recalled, then such application need not be allowed, which is not a case before us.

15. So on the facts of the said case, this court

found that the application was vague and, therefore, it was not required to be allowed. On the other hand, we also have with us a decision in the case of State of Gujarat v. Kamlesh Barot reported in 2000 (2) GCD 1034. There it has been observed that an application to recall witness for identifying the voice recorded in audio cassette was rejected. It was observed that expert and the persons who proved the audio cassette were examined subsequently and Investigating Officer had still not been examined. Therefore, it was found that the order was not justified and therefore, it was set aside and the trial court was directed to issue summons to recall the witnesses.

16. Then we have got one more decision with us in the case of Hitendra & Hitesh Patel v. State of Gujarat in Criminal Revision Application No.322 of 2000. There it has been observed that the power conferred under section 311 of the Code is nothing but a power in aid of the proceedings during the trial and is not a final order during the trial. If it is an interlocutory order, then, the revision against such order hardly lies in view of section 397 (2) of the Code. There is no justification to interfere with the exercise of power by the Court below to summon a witness for re-examination and further cross-examination. It would be seen that after examination and cross-examination by the learned APP, the present petitioner will still get opportunity to cross-examine the witnesses. Therefore, no prejudice is likely to be caused to the petitioner by recalling of witness sought for by the prosecution.

17. Learned APP Mr S P Dave has contended that certain witnesses have been contradicted with their earlier statement before the police by defence but the contradictions have not been proved. However, the prosecution has not prayed for recalling of Investigating Officer. Therefore, it is not a question to be decided here in this revision application. In that view of the matter, I am of the view that there is nothing wrong if the witnesses are permitted to be recalled. So far as the earlier order of the trial court refusing to treat the witnesses as hostile is concerned, the trial court will take appropriate steps and will pass appropriate order on hearing the parties. But so far as recalling of witnesses is concerned, there is no illegality and, therefore, this Revision Application is without any merit and deserves to be rejected. This Revision is accordingly rejected. Interim relief is vacated.

msp